Supreme Court, U.S.
FILED

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NO._____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DOUGLAS NELSON CARLISLE,

Petitioner,

VS.

LARRY ROBINETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE TEXAS COURT DECISIONS INTERPRETING OBJECTIVE REASONABLENESS OF THE POLICE OFFICER'S CONDUCT INVOLVE QUESTIONS OF SUBSTANCE THAT APPEAR INCONSISTENT WITH PRIOR RULINGS OF THIS COURT.

II. WHETHER THE TEXAS COURT DECISIONS ERRED IN FAILING TO DETERMINE THE SUFFICIENCY OF THE SEARCH WARRENT IN ASSESSING THE OBJECTIVE REASONABLENESS OF THE POLICE OFFICER'S ENTRY INTO THE RESIDENCE AND USE OF DEADLY FORCE.

III. WHETHER THE TEXAS COURT DECISIONS ERRED IN REVERSING THE TRIAL COURT'S DENIAL OF SUMMARY JUDGMENT BECAUSE THE POLICE OFFICER FAILED TO CONCLUSIVELY ESTABLISH THAT A NO-KNOCK ENTRY OF THE RESIDENCE WAS OBJECTIVELY REASONABLE.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioner, Douglas Nelson Carlisle

Respondent, Larry Robinett

Others: The City of Wichita Falls, Texas

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PETITION FOR A WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review a final judgment of the Texas Supreme Court entered in this action on December 13, 1996.

OPINIONS BELOW

The decision of the district court is not reported.

The decision of the Court of Appeals is reported at 928 S.W.2d 623 (Tex. App. - Fort Worth 1996).

The decision of the Supreme Court of Texas is not reported.

All decisions are contained in the attached Appendix.

BASIS FOR JURISDICTION

The final judgment of the Texas Supreme Court was entered on December 13, 1996. This Court has jurisdiction to review the final judgment of the Texas Supreme Court pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983

STATEMENT OF THE CASE

(i) STATEMENT OF FACTS.

For ease of identification the following will be used throughout this petition:

Petitioner will be called Carlisle.

Respondent will be called Robinett.

This is a civil rights action filed under 42 U.S.C. § 1983, in state court. Carlisle alleged that Robinett, a Police Officer for the City of Wichita Falls, Texas, violated Carlisle's constitutional rights to be free from excessive use of force, and unreasonable arrests and searches when Robinett critically wounded Carlisle during a no-knock and announce execution of a combination search and arrest warrant for the premises where Carlisle was baby-sitting a young girl.

(ii) COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

This case was filed on January 30, 1995.

Robinett moved for summary judgment based on qualified or official immunity.

The trial court denied Robinett's Motion for Summary Judgment, whereupon Robinett took an immediate interlocutory appeal from the denial of immunity pursuant to the provisions of Tex. Civ. Prac. & Rem Code Ann. § 51.014(5) to the Court of Appeals for the Second District of Texas at Fort Worth. The Court of Appeals reversed the trial court's denial of summary judgment and rendered judgment in favor of Robinett based on an assertion of immunity in a decision rendered June 27, 1996, that was not original designated for publication. Carlisle timely filed a Motion for Rehearing in the Court of Appeals which was overruled without a written opinion on August 15, 1996, at which time the Court of Appeals ordered its June 27, 1996, opinion to be published after reconsideration. Carlisle timely filed his Application for Writ of Error with the Supreme Court of Texas. On December 13, 1996, the Supreme Court of Texas denied the Application for Writ of Error with the notation "Writ Denied." No request for rehearing was made.

REASONS FOR GRANTING THE WRIT

I. The present case involves interpretation of federal substantive law. The decision to grant official immunity to the police officer conflicts with applicable decisions of this Court.

II. Factually this case has significant similarities to the abuses present in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). The nature of the abuse of civil rights was so egregious in *Bivens* that this court created what has since been known as a *Bivens* action. In this case the purported search warrant is clearly insufficient as a matter of law. In addition laws in place to require an officer to knock prior to breaking down the door of a residence were ignored based on the admitted "custom" of the police to ignore these laws.

ARGUMENT AND AUTHORITIES

Standard of Review

Procedurally this case is governed by Texas Law. In order to prevail on his Motion for Summary Judgment, Robinett was required to prove that there was no genuine issue as to any material fact and that he was entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985). When the Texas courts review a summary judgment, they accept as true all evidence favoring the nonmovant, indulging every reasonable inference and resolving all doubts in the nonmovant's favor. *Nixon, supra*. Under the facts of this case, Robinett was entitled to summary judgment only if he conclusively established all of the elements of his affirmative defense of qualified or official immunity. *Johnson County Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284 (Tex. 1996)

The sufficiency of the summary judgment evidence:

Official or qualified immunity is an affirmative defense, and as such, the burden is on the defendant to establish all its elements. Government employees are entitled to official immunity from suits arising from the performance of their (1) discretionary duties while acting in (2) good faith as long as they are (3) within the scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994) It is undisputed that Robinett was acting within his discretion and within the scope of his official capacity. The issue present on appeal involves whether the summary judgment evidence established that Robinett was acting in good faith. In *Chambers, supra*, the Texas Supreme Court adopted the federal standard of "objective reasonableness" in determining good faith in the area of civil rights violations by police officers. The Court stated, "the test is one of objective legal reasonableness, without regard to whether the government official involved acted with subjective good faith. '[W]e look to whether a

reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred.'" The evidence supporting Robinett's motion for partial summary judgment failed to satisfy the good faith standard established in *Chambers* and the federal case law elaborating on objective reasonableness. Robinett's affidavits do not recite that he reasonable believed that the combination search and arrest warrant in question was valid. The affidavits merely recite, "I believe I had probable cause to search the residence located 2142 Avenue E, Wichita Falls, Texas." Robinett did not swear that he read the search warrant and the underlying affidavit that the search warrant incorporated. An officer cannot manifest objective good faith by relying on a warrant based on an affidavit so lacking in *indicia* of probable cause, as is the underlying affidavit in this case, as to render official belief in its existence entirely unreasonable. *United States v. Leon*, 468 U.S. 897 at 923, 104 S.Ct. 3405, 82 L.Ed.2d

677 (1984) In footnote number 24 of this Court's opinion in *Leon*, the Court stated "it is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a 'bare bones' affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search."

Robinett's affidavits fail to satisfy the good faith standard established in *Chambers, supra*, because they are purely subjective statements of good faith and do not recite that his actions were according to an objective standard of what a reasonably prudent officer could have believed under the same or similar circumstances. Neither or Robinett's affidavits state whether a reasonably prudent officer under the

same or similar circumstances could have believed that Robinett's actions were justified.

The affidavit of Curtis Harrelson, Chief of Police of the City of Wichita Falls, was not based upon either established law or the information possessed by Robinett at the time of the shooting and is not sufficient to establish the officer's good faith.

The insufficiency of the combination search and arrest warrant:

Carlisle claimed that Robinett made an illegal, no-knock entry (i.e., without first knocking and identifying himself stating his purpose for demanding entry and allowing the occupants time to open the door) before Robinett forcibly entered the residence under the auspices of an insufficient bare bones affidavit so lacking in *indicia* of probable cause as to render an official's good faith belief in its existence entirely unreasonable so that Robinett could not manifest objective good faith reliance on the warrant issued on the basis thereof [citing *United States v. Leon*, 468 U.S. 897 at 923, 104 S.Ct. 3405, 82

L.Ed.2d 677 (1984)] and thereafter used excessive deadly force against him.

The combination search and arrest warrant and the supporting affidavit in this case does not contain any reference to Carlisle or any information which would constitute probable cause that he possessed marijuana. Furthermore, the affidavit does not allege that Carlisle was in charge of and controlled the residence in question. Rather, the affidavit recited that the premises were in charge of and controlled by "A male suspect known to affiant only as Travis." The warrant only authorized the officers to arrest and bring before the magistrate each suspected party named in the affidavit.

The first affidavit of Robinett attached to his Motion for Summary Judgment states: "As I scanned the room with my flashlight, I observed Carlisle lying face up on a couch. I was wearing a uniform with 'POLICE' emblazoned on both the front and back of my jacket. I shouted 'police' and ordered Carlisle to 'get down on the floor.' Carlisle raised up from the couch, pointed a handgun directly at my chest and then cocked the

trigger. In reasonable fear of my life, I backed away and began firing in self defense. I was successful in disabling Carlisle and preventing return fire, thus saving my own life. Plaintiff Carlisle was shot four times by me." The warrant did not specifically authorize Carlisle's arrest. Carlisle's mere presence on the premises at the time of the execution of the warrant did not authorize his detention. *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed 2d 238 (1978)

The warrant to search for contraband was not founded on probable cause. Thus, for Fourth Amendment purposes the warrant did not implicitly carry with it the limited authority to detain Carlisle as an occupant of the premises while a proper search was conducted. *Michigan v. Summers*, 452 U.S. 692 at 705, 101 S.Ct. 2587, 69 L.Ed.2d at 351 (1981)

The no-knock entry problem and how it conflicts with decisions of this court:

The requirement that law enforcement officials executing a search warrant on a person's home first knock and identify themselves, state their purpose for demanding entry

and allow the occupants time to open the door before forcibly entering has deep rooted common law origins that extended far beyond the adoption of the constitution. *United States v. Shugart*, 889 F.Supp. 963 (E.D. Tex 1995) Although Robinett argued that no-knock entry in question was justified, Robinett presented no evidence that the officers executing the search warrant for the residence had reason to believe that anyone inside the residence knew of the officers presence or their purpose and thus were likely to be in the process of destroying evidence. There was no evidence that anyone inside the residence had made arrangements to dispose of evidence in the event of a police raid. Instead, Robinett relies on Officer Burt's generalized concern that evidence might have been destroyed if they had announced their presence and purpose before entering the residence in question. Such generic concerns, however, exist in almost every case involving a search for drugs. If such concerns were sufficient to abate the necessity to comply with the "knock and announce" rule, officers would be excused from the rule in almost every

situation where they executed a drug related search warrant on a citizen's residence, since most narcotics are kept in readily disposable quantities and most homes are furnished with plumbing facilities which could be used to eliminate the presence of the drugs. *Shugart, supra*.

In *Wilson v. Arkansas*, 514 U.S. _____, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995), this Court held that the common law knock and announce principle forms a part of the reasonableness inquiry under the Fourth Amendment but remanded the case to the Arkansas Supreme Court to allow the State court to make any necessary findings of facts and to make the determination of the reasonableness and the necessary justification for the unannounced entry in that case. Presumably, the trial court found that Robinett failed to justify his no-knock entry in assessing Robinett's good faith relative to his assertion of qualified immunity.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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NO. 144,034-C

DOUGLAS NELSON CARLISLE, Plaintiff,	§	THE 89TH DISTRICT COURT
VS.	§	OF
CITY OF WICHITA FALLS, AND OFFICER LARRY ROBINETT, Defendants.	§	WICHITA COUNTY, TEXAS

ORDER

Defendant Larry Robinett's motion for partial summary judgment on the basis of qualified immunity came on for hearing. After considering the pleadings, the motion, the response, the evidence (including plaintiff's supplemental response to defendants' motion for summary judgment and the supplemental affidavit of Larry Robinett), and argument of counsel.

It is therefore ORDERED that defendant Larry Robinett's motion for partial summary judgment is denied.

SIGNED this 12 day of February, 1996.

Juanita Pavlick
Judge Presiding

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORTWORTH

NO. 2-96-074-CV

LARRY ROBINETT
APPELLANT

VS.

DOUGLAS NELSON CARLISLE
APPELLEE

FROM THE 89TH DISTRICT COURT OF WICHITA COUNTY

OPINION

This interlocutory appeal stems from a civil rights action filed under 42 U.S.C. Sec. 1983 (1994) by Douglas Carlisle.[1] Appellant Larry Robinett challenges trial court's denial of a partial summary judgment based upon his

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[1] State courts have concurrent jurisdiction over cases brought under the provisions of section 1983. See Martinez v. California, 444 U.S. 277, 283, 100 S. Ct. 553, 558, 62 L. Ed. 2d 481, 488 (1980). This court has previously held that a suit for damages comes within the provisions of section 1983. See Texas Educ. Agency v. Leeper, 843 S.W. 2d 41, 48

assertion of qualified immunity. Because we find that partial summary judgment was improperly denied, we reverse the order of the trial court and render summary judgment for Robinett based on his qualified immunity.

BACKGROUND

Robinett is a police officer in Wichita Falls, Texas. During the early morning hours of January 29, 1993, he and other officers with the North Texas Drug Enforcement Task Force executed a search warrant for illegal drugs at 2142 Avenue E in Wichita Falls. The officers believed that the suspects inside the residence could be armed and dangerous.

The police officers announced their presence and used a battering ram to knock the front door down after they were denied entry to the house. Robinett was the first officer to enter the house and was followed by Officer Albert Chapa. Robinett, wearing a uniform with the word

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(Tex. App.—Fort Worth 1991), rev'd in part on other grounds, 893 S.W.2d 432 (Tex. 1994).

"POLICE" emblazoned on the front and back of it, carried a flashlight in one hand and his gun in the other one.

As Robinett scanned the darkened room with his flashlight, he saw Carlisle lying face-up on a couch. Robinett shouted "Police" and ordered Carlisle to get down onto the floor. Carlisle did not get on the floor and, instead, pointed a handgun at Robinett's chest. Robinett began firing in self-defense and shot Carlisle four times. Carlisle was taken to Wichita General Hospital and has since been convicted of aggravated assault on a peace officer and illegal possession of a firearm by a felon.

Carlisle sued Robinett, claiming that Robinett used excessive and unreasonable force. Robinett moved for partial summary judgment, asserting qualified immunity. Carlisle responded that Robinett entered the residence illegally and failed to identify himself as a police officer before using deadly force. Partial summary judgment was denied based on state law.

POINT OF ERROR ONE

In his first point of error, Robinett claims the trial court erred in applying state, rather that federal, law. Carlisle sued Robinett under section 1983, claiming that the officer violated his federal civil rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. Robinett asserted the defense of qualified immunity and relied upon federal law in his motion for partial summary judgment. However, the trial court apparently relied upon state law in denying partial summary judgment, noting in a letter to counsel that Carlisle "presented sufficient . . . evidence to controvert the element of 'good faith' required to establish . . . qualified immunity."

The "good faith" element is a component for the affirmative defense of qualified immunity under state law. City of Lancaster v. Chambers, 883 S.W.2d 650 (Tex. 1994). Federal law governs this case. Borough of West Mifflin v. Lancaster, 45 F.3d 780, 790 (3rd Cir. 1995); USX Corp. v. Champlin, 992 F.2d 1380, 1385 (5th Cir. 1993);

Reese v. Anderson, 926 F.2d 494, 500 (5th Cir. 1991). Robinett's assertion of qualified immunity should have been evaluated under federal, and not state, law. Accordingly, point of error one is sustained.[2]

POINT OF ERROR THREE

Robinett further contends he was entitled to qualified immunity based on federal law. Robinett had been warned that the suspects inside the house could be armed and dangerous and he entered the house pursuant to a search warrant. Police officers executing the warrant identified themselves as such while attempting to enter the premises. Robinett was wearing a jacket with "POLICE" printed on the front and back of the jacket. Although he ordered Carlisle onto the floor, Carlisle pointed a gun at Robinett's chest. In a summary judgment case, the issue on appeal is whether the movant met his summary judgment burden by establishing that no genuine issue of material fact exists

[2] In his second point of error, Robinett claims that the trial court erred in denying his motion for partial summary judgment because he is entitled to qualified immunity under state law. Because our analysis of points of

and that movant is entitled to judgment as a matter of law. See TEX. R CIV. P. 166a(c); Cate v. Dover Corp., 790 S.W.2d 559, 562 (Tex. 1990); City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979). The burden of proof is on the movant, Acker v. Texas Water Comm'n, 790 S.W.2d 299, 301-02 (Tex. 1990), and all doubts about the existence of a genuine issue of a material fact are resolved against movant. Cate, 790 S.W.2d at 562; Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41, 47 (Tex. 1965). Therefore, we must view the evidence and its reasonable inferences in the light most favorable to the nonmovant. Great Am., 391 S.W.2d at 47.

> In deciding whether there is a material fact issue precluding summary judgment, all conflicts in the evidence will be disregarded and the evidence favorable to the nonmovant will be accepted as true. Harwell v. State Farm Mut. Auto Ins. Co., 896

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error one and three disposes of this appeal, we have no need to address

S.W.2d 170, 173 (Tex. 1995); Montgomery v. Kennedy, 669 S.W.2d 309, 311 (Tex. 1984). Evidence that favors the movant's position will not be considered unless it is uncontroverted. Great Am., 391 S.W.2d at 47.

Qualified immunity is a substantive right belonging to police officers. Schultea v. Wood, 47 F.3d 1427, 1430 (5th Cir. 1995). Police officers are immune if they could have reasonably believed their actions to be lawful in light of clearly established law and the information the officers possessed. Hunter v. Bryant, 502 U.S. 224, 228, 112 S. Ct. 534, 537, 116 L.Ed.2d 589, 595-96 (1991). Even if law enforcement officials err, they are entitled to qualified immunity if their decision was reasonable. Lampkin v. City of Nacogdoches, 7 F.3d 430, 435 (5th Cir. 1993), cert. denied, 114 S. Ct. 1400 (1994).

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point of error two.

In determining whether an officer has crossed the constitutional line in the use of force, attention is focused on the severity of the subject crime, whether the suspect posed an immediate threat to the safety of the officer, and whether the suspect was actively resisting arrest. Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L.Ed.2d 443, 445 (1989). These determinations must be made without the luxury of hindsight:

> We must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Stroik v. Ponseti, 35 F.3d 155, 158-59 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1692 (1995) (citing Smith v. Freland, 954 F.2d 343, 347 (6th Cir.), *cert denied*, 504 U.S. 915 (1992)).

Although the test for qualified immunity under state law is whether the officer was acting in good faith,

Chambers, 883 S.W.2d at 655-56, the test under federal law is one of objective reasonableness:

> Although the cases sometimes refer to the doctrine of qualified "good faith" immunity, the test is one of objective legal reasonableness, without regard to whether the government official involved acted with subjective good faith.
>
> ' We look to whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred.' Thus, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'

Swint v. City of Wadley, 5 F.3d 1435, 1441-42 (11th Cir. 1993) (citations omitted), cert. denied, 115 S. Ct. 1312 (1995).

Carlisle concedes in his brief that the parties agree Robinett was acting within his discretion and within the scope of his official capacity. He contends, however, that the summary judgment failed to establish his "objective good faith based on objective legal reasonableness."[3]

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[3] Carlisle's use of the "good faith" test implies a reliance upon state law, and in fact the authority he relies upon is state, rather than federal, case law. Although we now evaluate the evidence under the federal, rather than state, qualified immunity standard (as discussed in point of error

Carlisle argues that the affidavit used to obtain the search warrant indicates that the marijuana police sought was more likely to be found at 1409 Fulton Street (located directly behind 2142 Avenue E) rather than the address listed in the search warrant and the address where Carlisle was at the time of the shooting. Carlisle asserts that the affidavit is "bare bones" and "so lacking in *indicia* of probable cause as to render official belief in its existence entirely unreasonable." Carlisle also maintains that the officers used excessive force to enter the residence because they broke down the door before being refused admission after giving notice of their authority and purpose. In effect, Carlisle argues that because Robinett's initial entry into the residence was illegal, Carlisle was justified in using deadly force to protect himself, and the officer was not officially immune from firing in return.

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one), the summary judgment proof provided by both parties is still clearly relevant.

Robinett recited in his affidavit that he believed he had probable cause to enter the residence at 2142 Avenue E and entered pursuant to a search warrant. Whether the affidavit was sufficient to support the search warrant is an issue separate from the objective reasonableness of Robinett's entry once the warrant had been issued. Robinett stated that the warrant was executed shortly after 12:15 a.m. and that it was extremely quiet outside at that time of night.[4] Although Carlisle contends that the officers broke down the door "before being refused admission after giving notice of their authority and purpose, "Robinett testified that police officer Al Chapa "yelled 'Police, search warrant'" as the door was struck.[5] Officer Chapa's shout

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[4] Robinett's testimony from Carlisle's criminal trial was attached to Carlisle's response to the motion for summary judgment and is heavily relied upon by Carlisle in this appeal.

[5] Carlisle contends that the "custom implemented by the City of Wichita Falls is for officers to break down the door upon their arrival" and relies upon the testimony of a police officer at Carlisle's criminal trial. When asked why police used battering rams, the officer responded as follows:

> As with most places that I've had dealings with where illegal drugs are dealt, the people in there are afraid that the police are going to catch them, and they constantly make plans on how to keep from being caught. One of them being using lookouts. One of them being grab the stash and flush it if you see the police coming. And time is of the essence to not only

was, Robinett estimated, loud enough to be heard within a one block area. Robinett also said that the door was hit with a battering ram nearly a dozen times and that it was difficult to enter the house because the ram punched a hole in the door before the lock gave way. Robinett said that the noise "Practically shook the house." Upon entry, Robinett saw Carlisle. It was only after Carlisle refused Robinett's order to get onto the floor and pointed the gun at the officer's chest that Robinett fired his weapon.

Wichita Falls Police Chief Curtis Harrelson testified that, based upon his 37 years' experience as an officer, Robinett acted within the "acceptable, reasonable, and

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> obtain the evidence, but it's also important to us on some places to use the element of surprise in order to safeguard the officers and the evidence that would be there.

The officer then stated that the police didn't "just go up and knock on the door" to prevent the destruction of evidence and to safeguard themselves.

The United States Supreme Court has held that the common law "knock and announce" principle forms part of the reasonableness inquiry. See Wilson v. Arkansas, ___ U.S. ___, 115 S. Ct. 1914, 131 L.Ed.2d 976 (1995). Given that Robinett had been warned that the occupants of the house could pose a serious danger to police officers and that the officers feared destruction of the evidence, the policy described by Wichita Falls police officials and followed by Robinett in this instance was objectively reasonable.

lawful parameters of proper police training and conduct." We conclude that it was objectively reasonable for Robinett to assume that the occupants of the house were sufficiently apprised of his identity and purpose for entry given the loudness of the police officer's announcement and the length of time that it took the officers to enter the building. Although Carlisle told investigators that he had been sleeping, was awakened when the door came "flying open," and grabbed his pistol in self-defense upon seeing silhouettes, this, also, has no bearing on the objective legal reasonableness of Robinett's actions. As a result, point of error three is sustained.

The order of the trial court is reversed and we render summary judgment for Robinett based upon his qualified immunity.

WILLIAM BRIGHAM
JUSTICE

June 27, 1996

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

December 13, 1996

Holly Crampton
1300 Kemp Boulevard
Wichita Falls, TX 76309

Mr. W. Andrew Messer
Office of City Attorney
City of Wichita Falls
P.O. Box 1431
Wichita Falls, TX 76307

RE: Case Number 96-0954
Style: DOUGLAS NELSON CARLISLE
v.
LARRY ROBINETT

Dear Counsel:

Today, the "Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Sincerely,

John T. Adams, Clerk

by_____
Michael Kopp, Deputy

APPENDIX C

SEARCH WARRANT

JP1-1003555

THE STATE OF TEXAS

COUNTY OF WICHITA

To The Sheriff Or Any Peace Officer Of Wichita County, Texas, or any Peace Officer of the State of Texas, GREETING:

WHEREAS, the Affiant whose name appears on the attached Affidavit is a Peace Officer under the laws of the State of Texas and did heretofore this day subscribe and swear to said Affidavit before me (which said Affidavit is here now made part hereof for all purposes), and whereas I find that the verified facts stated by Affiant in said Affidavit show that Affiant has probable cause for the belief expressed therein and establish existence of proper grounds for issuance of this warrant:

NOW, THEREFORE, you are commanded to enter the suspected place described in said Affidavit and to there search for the personal property described in said Affidavit and to seize same and to arrest and bring before me each suspected party named in said Affidavit.

Further, you are ORDERED, pursuant to provisions of Article 18.10, Texas Code of Criminal Procedure, to retain custody of any property seized pursuant to this Warrant, until further order of this Court or any other court of appropriate jurisdiction shall otherwise direct the manner of safekeeping of said property. This Court grants you leave and authority to remove such seized property from this county, if and only if such removal is necessary for the safekeeping of such seized property by you, or if such

removal is otherwise authorized by the provisions of Article 18.10, T.C.C.P. You are furthered ORDERED to give notice to this Court, as a part of the inventory to be filed subsequent to the execution of this Warrant, and as required by Article 18.10, T.C.C.P., of the place where the property seized hereunder is kept, stored and held.

HEREIN FAIL NOT, but have you then and there this Warrant within three days, exclusive of the day of issuance and exclusive of the day of its execution with your return thereon, showing how you have executed the same, filed in this Court.

ISSUED AT 11:30 P.M., on this the 28 day of January, 1993, A.D., to certify which witness my hand this day.

Janice R. Sons
MAGISTRATE, Wichita County, Texas

AFFIDAVIT

STATE OF TEXAS

COUNTY OF WICHITA

The undersigned Affiant, being a Peace Officer under the laws of the State of Texas and being duly sworn, on oath makes the following statements and accusations:

1. There is in Wichita County, Texas, a suspected place described and located as follows:

A tan single story frame house with brown trim at 2142 Avenue E. The house has the address on the front and the house is trimmed in brown. The house is on the north side of the street and faces south.

2. Said suspected place is in charge of and controlled by each of the following named parties (hereafter called "suspected party" whether one or more) to wit:

A male suspect known to Affiant only as Travis.

3. It is the belief of Affiant, and Affiant hereby charges and accuses that said suspected party has possession of and is concealing at said suspected place in violation of the laws of the State of Texas the following described personal property, to wit: a controlled substance, to wit, marijuana.

4. AFFIANT HAS PROBABLE CAUSE FOR THE SAID BELIEF BY REASON OF THE FOLLOWING FACTS, TO WIT:
On 01-27-93 a confidential informant, who for

reasons of security shall remain unnamed, went to 2142 Ave E to purchase marijuana. The informant sent another person in to the house. The other person went in and gave the money supplied by the informant to a person known as Travis. Travis told the other person that he had to get the marijuana from "Three Fingered Marvin". Affiant knows "Three Fingered Marvin" to be Marvin Wayne Adams. Travis left 2142 Ave E and yelled out the back door to 1409 Fulton. This is directly behind 2142 Ave E. Both houses are painted the same color tan with brown trim. The informant saw Travis go to 1409 Fulton and then back to 2142 Ave E. As soon as Travis returned to 2142 Ave E, the person the informant sent in for the marijuana came back out and gave the marijuana to the informant. This person explained to the informant that Travis is in care and control of both 2142 Ave E and 1409 Fulton and that Travis allows Adams to live on Fulton in exchange for Adams holding most of the marijuana. Again on 01-28-93 Affiant sent the informant back to the same house.

Again, the informant gave money to the same other person to go in and buy marijuana. The other person went in and gave the money to Travis and the informant saw Travis go out the back door of 2142 Ave E and go into 1409 Fulton. The informant saw Travis leave after a short time and go back to 2142 Ave E. As soon as Travis returned the other person came back out and gave the marijuana to the informant. The other person said Travis always had marijuana and to come back any time. Affiant has received information in the past that this going on at this address. Officer Al Chapa has also received this information. Officer Bob Talley has received

information in the past that this was going on at this address. Affiant has observed traffic consistent with marijuana dealing at this address. Affiant personally knows Marvin Adams and is aware of Adams' involvement in illegal drugs. Adams has been arrested for drug offenses in the past. The informant has proven to Affiant the ability to recognize marijuana and the way it is packaged and sold. The informant is responsible for several felony arrests including but not limited to marijuana offenses. The informant has made these buys and observations within the last twenty four (24) hours.
Affiant believes Travis is in possession of marijuana at 2142 Ave. E and believes he will find marijuana there.

WHEREFORE, Your Affiant asks for the issuance of a warrant that will authorize the search of said suspected place and for said personal property and seizure of the same and for the arrest of each said suspected party, and to take custody of all seized property and safekeep such property as provided by statute.

signed by Greg Burt
Affiant

Subscribed and sworn to before me by the said Affiant on this 28th day of January, 1993 A.D.

signed by Janice R. Sons
MAGISTRATE, Wichita County, Texas

Supreme Court, U.S.
FILED
JUL 16 1997
CLERK

(2)

No. 96-1993

In The

Supreme Court of the United States

October Term, 1996

DOUGLAS NELSON CARLISLE,

Petitioner,

v.

LARRY ROBINETT,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION

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29 pp

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BRIEF IN OPPOSITION

Respondent files this brief in opposition and requests that the Court deny the petition for writ of certiorari.

STATEMENT OF JURISDICTION

Forty copies of a petition for writ of certiorari must be filed with the Clerk of this Court within 90 days after entry of judgment. Rules 12.1, 13.1. All copies of the petition must conform to the format of Rule 33.1. The petition for writ of certiorari in this case was due March 13, 1997. One copy of the petition was mailed on March 13, 1997, but it was not prepared as required by Rule 33.1. The remaining 39 copies, also not prepared as required by Rule 33.1, were forwarded by Federal Express on March 15, 1997 and received by the Clerk of this Court on March 17, 1997. The petition is, thus, untimely. Respondent objects.

STATEMENT OF THE CASE

Procedural History. This is a civil rights action. It was filed by a convicted murderer and drug dealer who was shot while attacking a police officer with deadly force. Although criminally convicted of assaulting a police officer and illegally possessing a hand gun, petitioner Douglas Nelson Carlisle ("Carlisle") sued officer Larry Robinett ("Robinett") in state court under 42 U.S.C. §1983 for purportedly violating his constitutional rights. Officer Robinett filed a motion for summary judgment

based on qualified immunity, which the trial court denied. Officer Robinett immediately appealed the judgment to the Court of Appeals, Second Court of Appeals District of Texas. After considering the evidence and its reasonable inferences in the light most favorable to petitioner, the court of appeals reversed the trial court's judgment, finding officer Robinett entitled to qualified immunity as a matter of federal law. The opinion was not originally designated for publication. Officer Robinett filed a motion to publish because of the dearth of state case law interpreting §1983 and qualified immunity. The motion was granted and the opinion exonerating officer Robinett was published at 928 S.W.2d 623 (Tex. App. – Fort Worth 1996, writ denied). (All citations to the court of appeals decision will be to the opinion attached as Appendix B to the petition for writ of certiorari.) Petitioner asked for a rehearing before the court of appeals. The request was denied. The Texas Supreme Court similarly denied petitioner's application for writ of error.

Fact Statement. In the early morning hours of January 29, 1993, police officer Larry Robinett and several other officers from the North Texas Drug Enforcement Task Force executed a search warrant for illegal drugs at 2142 Avenue E, Wichita Falls, Texas. The search warrant had been issued by justice of the peace Janice Sons. Police intelligence had determined that drug suspects inside the house could be armed and dangerous. When the Task Force banged on the door and loudly demanded that it be opened, the occupants of the house refused to peaceably respond. After repeatedly shouting "police, search warrant", the Task Force battered down the door. Officer

Robinett was the first officer to enter the residence. Officer Albert Chapa followed. There were no lights on at the residence, so the officers carried a flashlight in one hand and a police weapon in the other hand. As officer Robinett scanned the room with his flashlight, he observed Carlisle on a couch. Officer Robinett was wearing a uniform with "POLICE" emblazoned on both the front and back of his jacket. Officer Robinett shouted "police" and ordered Carlisle to "get down on the floor". Instead of obeying the officer's command, Carlisle pointed a handgun directly at officer Robinett's chest and then cocked the trigger. In reasonable fear of his life, officer Robinett backed away and began firing in self defense. He was successful in disabling Carlisle and preventing return fire, thus saving his own life. Carlisle was shot four times. Emergency medical treatment was immediately rendered to Carlisle at the scene. He was then transported by ambulance to Wichita General Hospital.

Carlisle was convicted, based on these facts, for aggravated assault of a peace officer and illegal possession of a firearm by a felon. The convictions have been upheld on appeal, *Carlisle v. State*, No. 02-95-211-CR (Tex. App. – Fort Worth 1996), and a criminal mandate has been issued. Carlisle had previously been convicted of murder and delivery of a controlled substance, cocaine.

Officer Robinett believed he had probable cause to search the residence located at 2142 Avenue E, Wichita Falls, Texas. He relied on the search warrant issued by a local magistrate. At no time did officer Robinett use any force which he believed to be excessive or unreasonable under the circumstances. These facts are buttressed by the expert opinion of Curtis Harrelson, Chief of Police for

the City of Wichita Falls. Chief Harrelson has 37 years of training and experience as a police officer. Based upon this expertise, it is Chief Harrelson's opinion that officer Robinett acted within the acceptable, reasonable and lawful parameters of proper police training and conduct in Texas. It is his further opinion that officer Robinett's acts were both necessary and justified. Carlisle offered no expert testimony in rebuttal.

Correction of Misstatements in the Petition. In his petition for writ of certiorari, Carlisle cites and discusses the standards of official immunity under state law. (Petition at 9). This is a misstatement of law. Carlisle sued officer Robinett under a federal statute, 42 U.S.C. §1983, for violating his federal civil rights. Officer Robinett asserted the federal defense of qualified immunity in his motion for summary judgment. Federal, not state, law therefore governs this case. *Borough of West Mifflin v. Lancaster,* 45 F.3d 780, 790 (3rd Cir. 1995); *USX Corp. v. Champlin,* 992 F.2d 1380, 1385 (5th Cir. 1993); *Reese v. Andrews,* 926 F.2d 494, 500 (5th Cir. 1991).

REASONS FOR DENYING THE WRIT

I. Officer Robinett is entitled to qualified immunity.

Qualified immunity is a substantive right belonging to police officers. *Schultea v. Wood,* 47 F.3d 1427, 1430 (5th Cir. 1995). Its principal purpose is to shield officials not only from liability but also from defending against a lawsuit. *Span v. Rainey,* 987 F.2d 1110, 1111 (5th Cir. 1993). "Qualified immunity is in part an entitlement not to be forced to

litigate the consequences of official conduct. . . . " *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985).

Police officers are immune if they could have reasonably believed their actions to be lawful in light of clearly established law and the information the officers possessed. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991); *Johnson v. City of Houston*, 14 F.3d 1056, 1059 (5th Cir. 1994). Even if law enforcement officials err, they are entitled to qualified immunity if their decision was reasonable, albeit mistaken. *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 435 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1400, 128 L.Ed. 2d 73 (1994). Qualified immunity has therefore been recognized to protect all but the plainly incompetent or those who knowingly violate the law. *Hunter v. Bryant*, 502 U.S. at 229. It operates as a cloaking device from personal liability for officers who act in an objectively reasonable manner. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments in circumstances that are tense, uncertain and rapidly evolving." *Graham v. Conner*, 490 U.S. 386, 396-97 (1989). Determining whether an officer has crossed the constitutional line must be made without the luxury of hindsight:

> . . . we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable'

> action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. *Stroik v. Ponseti*, 35 F.3d 155, 158-59 (5th Cir. 1994), *quoting*, *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992).

A. The use of deadly force was justified.

Applying these standards, federal courts have consistently held that an officer under attack may employ deadly force to defend himself. *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992) (officer entitled to qualified immunity for shooting and killing driver of truck who was driving truck straight at officer, showing no sign of attempting to stop or driving around him); *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985) ("If Young's movements gave Olsen cause to believe there was a threat of serious physical harm, Olsen's use of deadly force was not a constitutional violation."); *Drewitt v. Pratt*, 999 F.2d 774 (4th Cir. 1993) (when suspect sped toward officer with car, officer was entitled to qualified immunity in shooting of suspect to prevent his own death or great bodily harm); *Liebenstein v. Crowe*, 826 F.Supp. 1174 (E.D. Wis. 1992) (officers who shot and killed heavily armed man in front of his home were entitled to qualified immunity where man had been firing in the air and in the direction of concealed police officers). The use of deadly force, thus, is not a constitutional violation when an assailant gives an officer cause to believe that there is a threat of serious physical harm to the officer or to others. To be shielded by qualified immunity when employing deadly force, a police officer need only show that he reasonably feared a threat to his life or the life of others.

Conversely, there is no right which guarantees protection to an individual from the use of force during or following his attack on a police officer.

In *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991), the Fifth Circuit held that a police officer was entitled to qualified immunity in a §1983 action where the officer shot and killed a robbery suspect. Responding to a radio call for the robbery of a convenience store, the police officer in *Reese* spotted the suspects' car and began to give chase. During the chase, the suspects threw out of the car window what appeared to be parts of a cash register. The suspects' car eventually spun out of control and the police car pulled alongside the suspects' car. Kneeling behind his open car door, the police officer instructed the suspects to raise their hands. After initially complying, the suspect in the front passenger seat reached down below the seat with his left hand. The officer again commanded the suspects to raise their hands and again the suspect in the passenger seat raised and then lowered his hand. After this happened several times, the officer, fearing for his safety, shot the suspect once in the head, killing him. The officer later found that the suspect was, in fact, unarmed. The officer filed for summary judgment based on qualified immunity, which the district court denied. On appeal, the Fifth Circuit concluded that "a reasonable officer could well fear for his safety and that of others nearby. He could reasonably believe that [the suspect] had retrieved a gun and was about to shoot." *Id.* at 501. For this reason, the "officer [was] justified in using deadly force to defend himself and others around him." *Id.* at 501, and the officer was entitled to summary judgment as a matter of law.

The Fifth Circuit in *Stroik v. Ponseti*, 35 F.3d 155 (5th Cir. 1994) again found qualified immunity where an officer feared for his safety and that of others nearby. In that case, police officers heard a police radio broadcast concerning a series of armed robberies. The message indicated that four persons were suspected of committing the robberies, that the suspects were driving a blue van, and that two of the suspects were black and two were white. The broadcast further indicated that the suspects were armed. The officers joined in pursuit when observing two other police vehicles following a blue van at high speed. The blue van eventually lost control and ran into a curb. One suspect began to flee on foot. One of the officers also observed a black male and a white female exiting the van through the side door. The black male, situated behind the white female with his left had around her waist, pointed a gun at the police officer. The officer immediately fired his gun 7 to 9 times, killing the black male and wounding the white female. It was later determined that the white female had been carjacked by the two black males and taken as a hostage. The former hostage sued the police officer and others for violating her civil rights. Upon a jury trial, verdict was rendered in favor of the former hostage. The officer appealed based on qualified immunity. The appeal was decided by 2 crucial facts: [1] the assailant had pointed a gun at the officer and [2] the officer's life was actually in jeopardy when he shot. *Id.* at 159. Given these facts, the appellate court concluded that the officer had "probable cause to believe that the suspect[s] pose[d] a threat of serious physical harm." *Id.* at 159. Because the officer could have reasonably believed that the suspects posed an imminent, deadly threat, the

Fifth Circuit held that the officer was justified in using deadly force and granted qualified immunity.

The facts in this case establish that officer Robinett entered the residence pursuant to a search warrant. He was aware that drug suspects could be armed and dangerous. Carlisle was immediately uncooperative by disobeying officer Robinett's commands. Within seconds, Carlisle's resistance escalated to a level of deadly force. Faced with the threat of his own life, officer Robinett acted reasonably. When the suspect refused to "get down on the floor" as ordered, and instead, cocked a gun pointed directly at officer Robinett's chest, officer Robinett was justified in returning the use of deadly force. *See Tennessee v. Garner*, 471 U.S. 7, 31 (1985) (deadly force may be used if a suspect threatens an officer with a weapon). There was no constitutional violation because officer Robinett believed that Carlisle, like the assailants in *Reese* and *Stroik*, posed an imminent, deadly threat.

B. The entry into the residence was reasonable.

Qualified immunity likewise protects officer Robinett during his entry into the residence where Carlisle was staying. Robinett recited in his affidavit that he believed he had probable cause to enter the residence of 2142 Avenue E and entered pursuant to a search warrant. The warrant was executed shortly after midnight when it was extremely quiet. Robinett testified that the officers yelled and screamed "Police, search warrant" before and as the door was struck. The shout was loud enough to be heard within a one-block area. The door was hit with a battering ram nearly a dozen times which "practically shook

the house." This entry was made because the officers feared, not only for their own safety, but that the occupants would destroy the narcotics prior to entry. These facts are uncontroverted. And police chief Curtis Harrelson, based on 37 years of law enforcement experience, opined that officer Robinett acted within the "acceptable, reasonable, and lawful parameters of proper police training and conduct." This opinion evidence, too, is uncontroverted. The court of appeals therefore concluded "that it was objectively reasonable for Robinett to assume that the occupants were sufficiently apprised of his identity and purpose for entry given the loudness of the police officer's announcement and the length of time it took the officers to enter the building." (op. at B-13).

This conclusion is consistent with *Wilson v. Arkansas*, ___ U.S. ___, 115 S.Ct. 1914, 131 L.Ed. 2d 976 (1995). In that case police officers armed with both search and arrest warrants entered the residence of a suspect through an unlocked screen door. The officers announced their presence while they were entering. Once inside, the officers seized drugs, a gun, ammunition, and found the suspects flushing marijuana down the toilet. Before trial, one of the suspects sought to suppress the evidence seized because the officers failed to "knock and announce" before entering the home. The trial court denied the suppression motion, and subsequently, the suspect was convicted. The Arkansas Supreme Court affirmed the conviction, rejecting the suspect's argument that the Fourth Amendment requires officers to knock and announce prior to entering the residence. This Court granted certiorari to determine whether the knock-and-announce principle forms part of the Fourth Amendment.

In evaluating the scope of this right, the Court looked to the traditional protections against unreasonable searches and seizures afforded by early common law at the time of the framing of the Bill of Rights. The common law of England held that a person is entitled to notice before law enforcement enters a residence, and if notice is given, it is presumed that the occupant will obey. *Id.* at ___, 115 S.Ct. at 1917. Although common law endorsed the practice of announcement, the Court found that the principle was not an inflexible rule requiring announcement under all circumstances. Instead, the principle of announcement is simply one of many factors to be considered under the Fourth Amendment in assessing a search's reasonableness. Countervailing law enforcement factors, *e.g.*, the threat of physical harm to police, the fact that an officer is pursuing an escaped arrestee, reason to believe that evidence might be destroyed if advance notice were given, may establish the reasonableness of an unannounced entry. *Id.* ___, 115 S.Ct. at 1918-19. The Arkansas police officers in that case contended that the search was reasonable under the Fourth Amendment and the judgment below should be affirmed because a prior announcement would have placed them in peril and given the suspect opportunity to destroy the narcotics evidence. These facts, unfortunately, were not in the record and the Court remanded the case to develop findings of fact, noting "[t]hese considerations may well provide the necessary justification for the unannounced entry in this case." *Id.* at ___, 115 S.Ct. at 1919.

The record here evidences, and the court of appeals found, the officers had been warned that the occupants of

the house could pose a serious danger and that the officers feared destruction of the narcotics could occur. (op. at B-2, 11 n. 5). Either one of these factors would have justified a no-knock entry. *Richards v. Wisconsin*, 520 U.S. ___, 117 S.Ct. ___, 187 L.Ed. 2d 615 (1997). Unlike an unlocked screen door in *Wilson*, the officers in this case encountered a door so secured that it took a battering ram nearly 12 attempts to sufficiently enter. This drug raid was also executed in the quiet of the night. When the door was first struck, the officers yelled "Police, search warrant" loud enough to be heard within a one-block area. Given these circumstances, the appellate court found that the occupants of the house were sufficiently apprised of the identity of the police and purpose for entry. (op. at B-13). The entry was reasonable under the Fourth Amendment.

C. The search warrant was facially valid.

Carlisle claims that the search warrant was based on a "bare bones affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable". While an insufficient warrant, itself, can constitute grounds for a §1983 claim, it has little bearing on the affirmative defense of qualified immunity by officers effecting the warrant. So held the court of appeals (op. at B-11). "[A] warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." *U.S. v. Leon*, 468 U.S. 879, 922 (1984), *quoting*, *U.S. v. Ross*, 456 U.S. 798, 823 n. 32 (1982). It is absurd to argue that the subsequent invalidation of a warrant automatically

destroys an officer's immunity. The propriety of a warrant and the qualified immunity of an officer are two, separate issues. *See Malley v. Briggs*, 475 U.S. 335 (1986); *Soares v. State of Connecticut*, 8 F.3d 917 (2nd Cir. 1993); *Bagby v. Broadhaver*, 98 F.3d 1096 (8th Cir. 1996). It is equally absurd to suggest that officer Robinett had an obligation to independently review the magistrate's determination of probable cause, particularly when officer Robinett had nothing to do with obtaining the warrant. An officer charged with executing a facially valid court order has no choice but to do so. *Mays v. Sudderth*, 97 F.3d 107, 113 (5th Cir. 1996). Police officers "should not be required to make the Hobson's choice between disobeying the court order or being hauled into court to answer for damages." *Patterson v. Von Reisen*, 999 F.2d 1235, 1240 (8th Cir. 1993). To hold otherwise would require police officers and other court officials enforcing facially valid orders "to act as pseudo-appellate courts scrutinizing the orders of judges." *Id.* at 1289. Such a result is obviously untenable, *Mays v. Sudderth*, 97 F.3d at 113; *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1239 (7th Cir. 1986), and would unduly hamper law enforcement.

In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *U.S. v. Leon*, 468 U.S. 879, 921 (1984), *quoting in part, Stone v. Powell*, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring).

A neutral and detached magistrate made a determination of probable cause in this case. The magistrate's determination is entitled to great deference, *U.S. v. Ishmael*, 48 F.3d 850, 857 (5th Cir. 1995), upon which officer Robinett was entitled to rely. Upon finding probable cause, the magistrate issued a search warrant commanding any peace officer of Wichita County, Texas, to conduct the search. Based on this command, officer Robinett's *only* duty was to duly execute the search warrant. TEX. CODE CRIM. PROC. art. 18.06(a).[1]

Assuming *arguendo* that every officer on the scene had an affirmative duty to second-guess the magistrate's determination of probable cause, a review of the supporting affidavit in accordance with the law is necessary. Both the United States and Texas constitutions provide that a search warrant must be based on probable cause supported by oath or affirmation. U.S. CONST. amend. IV; TEX. CONST. art. I, sec. 9. To support a search warrant, the affidavit must set forth facts which are sufficient to establish probable cause. *Mayfield v. State*, 800 S.W.2d 932, 934 (Tex. App. – San Antonio 1990, no writ).

Determination of whether the affidavit is sufficient to show probable cause is limited to the four corners of the affidavit. *Bell v. State*, 747 S.W.2d 898, 901 (Tex. App. – Ft. Worth 1988, writ ref'd.). An affidavit supporting a search warrant must be interpreted in a common sense manner, *State v. Cantu*, 785 S.W.2d 181, 183 (Tex. App. – Houston [14th Dist.] 1990, no writ), and the magistrate reviewing

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[1] "A peace officer to whom a search warrant is delivered shall execute it without delay and forthwith return it to the proper magistrate." TEX. CODE CRIM. PROC. art. 18.06(a).

the affidavit is entitled to draw inferences from the facts contained within the affidavit. *Casillas v. State*, 719 S.W.2d 585, 587-88 (Tex. Crim. App. 1989). When faced with a search warrant affidavit, a magistrate is not bound by such finely tuned standards as proof beyond a reasonable doubt or by a preponderance of the evidence. Rather, the sole concern is probability. *Rodriguez v. State*, 781 S.W.2d 946, 949 (Tex. App. – Dallas 1989, writ ref'd.). The task of the issuing magistrate is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

A determination of probable cause made by a detached and neutral magistrate should be paid great deference by reviewing courts. *Gates*, 462 U.S. at 326. Reflecting this preference for the warrant process, a reviewing court is not to conduct a *de novo* review, but simply ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Gates*, 462 U.S. at 238; *Rodriguez*, 781 S.W.2d at 948. The Fourth Amendment requires no more. *Bower v. State*, 769 S.W.2d 887, 902 (Tex. Crim. App. 1989).

Here, the affidavit for the search warrant was sworn by an officer of the Wichita Falls police department, Greg Burt. The affidavit states that the information was obtained from an informant, an unidentified third person, and police officers Al Chapa and Bob Talley. The affidavit states that officer Burt had probable cause to believe that on January 28, 1993, a controlled substance, marijuana,

was being held at 2142 Avenue E, Wichita Falls, Texas. This averment is supported by the following facts:

> On 01-27-93 a confidential informant, who for reasons of security shall remain unnamed, went to 2142 Ave E to purchase marijuana. The informant sent another person in to the house. The other person went in and gave the money supplied by the informant to a person known as Travis. Travis told the other person that he had to get the marijuana from 'Three Fingered Marvin'. Affiant knows 'Three Fingered Marvin' to be Marvin Wayne Adams. Travis left 2142 Ave E and walked out the back door to 1409 Fulton. This is directly behind 2142 Ave E. Both houses are painted the same color tan with brown trim. The informant saw Travis go to 1409 Fulton and then back to 2142 Ave E. As soon as Travis returned to 2142 Ave E, the person the informant sent in for the marijuana came back out and gave the marijuana to the informant. This person explained to the informant that Travis is in care and control of both 2142 Ave E and 1409 Fulton and that Travis allows Adams to live on Fulton in exchange for Adams holding most of the marijuana. Again on 01-28-93 Affiant sent the informant back to the same house. Again, the informant gave money to the same other person to go in and buy marijuana. The other person went in and gave the money to Travis and the informant saw Travis go out the back door of 2142 Ave E and go into 1409 Fulton. The informant saw Travis leave after a short time and go back to 2142 Ave E. As soon as Travis returned the other person came back out and gave the marijuana to the informant. The other person said Travis always had marijuana and to come back anytime.

> Affiant has received information in the past that this going [sic] on at this address. Officer Al Chapa has also received this information. Officer Bob Talley has received information in the past that this was going on at this address.
>
> Affiant has observed traffic consistent with marijuana dealing at this address. Affiant personally knows Marvin Adams and is aware of Adams' involvement in illegal drugs. Adams has been arrested for drug offenses in the past. The informant has proven to affiant the ability to recognize marijuana and the way it is packaged and sold. The informant is responsible for several felony arrests including but not limited to marijuana offenses. The informant has made these buys and observations within the last twenty four (24) hours.
>
> Affiant believes Travis is in possession of marijuana at 2142 Ave E and believes he will find marijuana there.

The cumulative weight of these facts is abundantly sufficient to show probable cause that marijuana would be found at 2142 Avenue E. Besides being supported by two drug purchases from "Travis" within the last 24 hours, this conclusion is strengthened by the fact that "Travis" had care and control of 2142 Avenue E and stated he "always had marijuana" and to "come back anytime." This, coupled with the fact that traffic was consistent with marijuana dealing and three police officers[2] received information that this address was a known

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[2] It is entrenched in Texas jurisprudence that police officers, as informers and affiants, implicitly are worthy of belief by a magistrate. *Wilkerson v. State*, 726 S.W.2d 542, 545

drug residence, support a magisterial conclusion of probable cause. Clearly, officer Robinett's reliance on the warrant was objectively reasonable. *See U.S. v. Leon*, 468 U.S. at 926 (even when an affidavit creates disagreements as to the existence of probable cause, the officer's reliance on a magistrate's determination of probable cause is objectively reasonable).

By comparison, the affidavit in this case is stronger and contains more factual information than either of the affidavits held sufficient in *Bodin v. State*, 782 S.W.2d 258 (Tex. App. – Houston [14th Dist.] 1989), *rev'd on other grounds*, 807 S.W.2d 313 (Tex. Crim. App. 1991) and *Salazar v. State*, 806 S.W.2d 291 (Tex. App. – Amarillo 1991, no writ). Both of those cases dealt with search warrants involving narcotics. The affidavit in *Bodin* contained two substantive paragraphs describing a controlled buy in an apartment by a reliable informant. The affidavit said nothing about narcotics being in the apartment when the police sought to search. Nevertheless, this affidavit passed constitutional muster upon appellate scrutiny. The affidavit in *Salazar* was much weaker. It contained one substantive paragraph describing a controlled buy two days earlier by an informant. The affidavit said nothing about the informant's reliability. Yet, it demonstrated probable cause. The affidavit here contains four paragraphs of substantive facts describing two controlled buys within 24 hours at the same location involving the same reliable informant responsible for several

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(Tex. Crim. App. 1986); *Towery v. State*, 499 S.W.2d 160, 163 (Tex. Crim. App. 1973); *Kolbert v. State*, 644 S.W.2d 150, 153 (Tex. App. – Dallas 1982, no writ).

prior felony arrests. This information alone, according to *Bodin* and *Salazar,* would support a finding of probable cause. But, the affidavit contains more. Three police officers had independently received information regarding drug activity at this address. And the affiant further observed vehicular traffic consistent with marijuana dealing at this address. All of this information points to the fact that marijuana would probably be found at 2142 Avenue E. Although Carlisle says that officer Burt's affidavit is a "bare bones affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable", the facts state otherwise.

There is a third equally compelling reason that qualified immunity cloaks officer Robinett in his reliance on the search warrant. The evidence. Officer Robinett authenticated a copy of the search warrant and testified in his affidavit that probable cause existed to enter the residence. This testimony is supported by the expert opinion of police chief Curtis Harrelson that officer Robinett acted within the acceptable, reasonable and lawful parameters of proper police training and conduct. Although Carlisle alleges that no officer could have relied on the search warrant, no evidence was offered to support this supposition.

D. The arrest was based on probable cause.

Not only was probable cause to search the premises established at the time the warrant was issued, it was still present when the police executed the warrant. Upon entering the residence, the officers were instantly faced with deadly force. A peace officer may arrest an offender

without warrant for any offense committed in his presence or within his view. TEX. CODE CRIM. PROC. art. 14.01(b). From the moment that Carlisle pointed his weapon at officer Robinett, Carlisle committed an aggravated assault on a peace officer. A warrantless arrest, as in this case, is constitutionally valid if the arresting officer had probable cause to make the arrest. *U.S. v. Lowery*, 436 F.2d 1171, 1174 (5th Cir. 1970). Probable cause is a cognizable defense to a §1983 arrest claim. *Howell v. Tanner*, 650 F.2d 610, 614 (5th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982); *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990). Probable cause is established if the officer had knowledge that would warrant a prudent person's belief that the person arrested had already committed or was committing a crime. *Duckett v. City of Cedar Park, Texas*, 950 F.2d 272, 278 (5th Cir. 1992). Because officer Robinett was present as the events unfolded and was the victim of the aggravated assault, undoubtedly, he had probable cause to arrest Carlisle. Carlisle claims, however, that, because the search warrant did not name him and specifically authorize his arrest, he could not be touched by the officers. (Petition at 14). Carlisle completely misses the point. He was not arrested pursuant to the warrant; he was arrested without warrant based on his illegal, potentially life-ending, conduct.

II. Carlisle's criminal convictions bar his civil claims under *Heck v. Humphrey*

Carlisle seeks to prove his arrest was unconstitutional. He argues that the entry was illicit because the

search warrant was invalid, no officer could have reasonably believed the warrant to be valid, and the police made a "no knock entry." These same issues were asserted without success in Carlisle's criminal trial and appeal. *Carlisle v. State*, No. 02-95-211-CR (Tex. App. – Fort Worth 1996). The Court is requested, pursuant to TEX. R. CIV. EVID. 201, to take judicial notice of these criminal proceedings. *Langdale v. Villamill*, 813 S.W.2d 187, 189-90 (Tex. App. – Houston [1st Dist.] 1991, no writ); *Bryan v. Blue*, 724 S.W.2d 400, 402 (Tex. App. – Waco 1986, no writ).

In *Heck v. Humphrey*, 512 U.S. ___, 114 S.Ct. 2364, 129 L.Ed. 2d 383 (1994), the Court broadly held that any §1983 claim which attacks the constitutionality of a conviction does not accrue until that conviction has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus". *Id.* at ___, 114 S.Ct. at 2372. The Court applied this rule further to hold that a §1983 claim, which alleges harm based upon conduct that would imply that the conviction is invalid, does not mature until the conviction has been lawfully set aside. *Id.* The embryonic nature of a §1983 claim was emphasized when the Court spoke of the claim as "not cognizable", and proclaimed that courts deny "the existence of a §1983 cause of action so long as the conviction stands undisturbed." *Id.* at ___, 114 S.Ct. at 2373.

A state prisoner, like Carlisle, may not challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. §1983. *Id.* at ___, 114 S.Ct. ___, 129 L.Ed. 2d 2382. In fact, a §1983 claim that falls under the rule in

Heck is considered legally frivolous. *Hamilton v. Lyons*, 74 F.3d 99, 102 (5th Cir. 1996). To permit a convicted criminal to proceed with a civil rights claim would permit a collateral attack on the conviction through the vehicle of a civil suit. *Heck*, 512 U.S. at ___, 114 S.Ct. at 2382. As a matter of law, Carlisle cannot state a claim because Carlisle's convictions of aggravated assault of a peace officer and possession of a firearm by a felon constitute a final judgment on the matter, which bars this civil suit. *Wells v. Bonner*, 45 F.3d 90, 95-96 (5th Cir. 1995); *Jackson v. Vannoy*, 49 F.3d 175, 177 (5th Cir. 1995).

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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